

STATE OF MICHIGAN
COURT OF APPEALS

DERITH SMITH,

Plaintiff-Appellee,

V

ANONYMOUS JOINT ENTERPRISE, GEORGE
PRESTON, MARY BARROWS, VILLAGE OF
SUTTONS BAY, CHARLES STEWART, NOEL
FLOHE, and JOHN STANEK,

Defendants,

and

DONALD BARROWS,

Defendant-Appellant.

UNPUBLISHED

March 3, 2011

No. 275297

Leelanau Circuit Court

LC No. 05-006952-CZ

DERITH SMITH,

Plaintiff-Appellee,

V

ANONYMOUS JOINT ENTERPRISE, GEORGE
PRESTON, DONALD BARROWS, MARY
BARROWS, VILLAGE OF SUTTONS BAY,
CHARLES STEWART, and NOEL FLOHE,

Defendants,

and

JOHN STANEK,

Defendant-Appellant.

No. 275316

Leelanau Circuit Court

LC No. 05-006952-CZ

DERITH SMITH,

Plaintiff-Appellee,

V

DONALD BARROWS and JOHN STANEK,

Defendants,

and

NOEL FLOHE,

Defendant-Appellant.

No. 275463

Leelanau Circuit Court

LC No. 05-006952-CZ

ON REMAND

Before: SAAD, P.J., and FORT HOOD and BORRELLO, JJ.

PER CURIAM.

This case concerns whether a cause of action for defamation exists based on the distribution of a report from plaintiff's personnel file and is on remand from our Supreme Court. *Smith v Anonymous Joint Enterprise*, 487 Mich 102; ___ NW2d ___ (2010). We reverse and remand for entry of judgment in favor of the remaining defendants Donald Barrows and John Stanek.¹

This case arises from a dispute between political adversaries. Plaintiff and defendants, Donald Barrows and John Stanek, were involved in local politics. Plaintiff worked for the Village of Suttons Bay. During her employment, the village manager, Charles Stewart, prepared a report to the personnel committee to address various issues regarding plaintiff's employment. She was terminated from her employment with the village, but never saw the report that was placed in her personnel file. After plaintiff was elected as the supervisor of Elmwood Township, defendants obtained a copy of the report. The report was mailed to residents in the local and surrounding communities and distributed at a meeting. Someone added a handwritten caption on the document that stated, "Attention: Suttons Bay Villagers Alledged (sic) Misuse of Taxpayer

¹ The Supreme Court held that there was insufficient evidence of "actual malice" by defendant Noel Flohe, and therefore, we resolve the issues surrounding defendants Barrows and Stanek only. *Smith*, 487 Mich at 106.

Funds?” The employee who was the subject of the report was only identified as “Deri.” Someone also handwrote “Derrick (sic) Smith” on the report. Ultimately, plaintiff pursued a defamation action against defendants, Barrows and Stanek, and Noel Flohe, the men who acknowledged mailing the personnel report. The jury rendered a monetary award in favor of plaintiff with the additional requirement that defendants publicly apologize to her. We reversed the jury verdict, holding that plaintiff, a public figure, failed to meet her burden of proof with regard to the actual malice requirement. Our Supreme Court reversed and remanded, stating:

In this case, we decide whether plaintiff, Derith Smith, presented clear and convincing evidence at trial to support the jury’s finding that defendants John Stanek, Donald Barrows, and Noel Flohe defamed plaintiff by mass-mailing copies of a personnel report containing false information about her. After conducting an independent review of the record, we conclude there exists clear and convincing evidence that Stanek and Barrows acted with “actual malice,” but that plaintiff has failed to meet her evidentiary burden as to Flohe.

Accordingly, we affirm the result reached by the Court of Appeals as to Flohe, but reverse the result it reached as to Stanek and Barrows. We remand this matter to the Court of Appeals for consideration of defendants’ other issues, including whether the handwritten caption on the mailed report constitutes a non-defamatory statement of opinion when considered in its context within the report as a whole, whether the caption is provable as false, and whether defendants are entitled to the protection afforded by Michigan’s statutory fair reporting privilege. [*Smith*, 487 Mich at 106.]

We allowed the parties to file supplemental briefs to address the remaining issues. After reviewing the briefs and the evidence, we once again reverse the jury verdict and remand for entry of judgment of no cause of action in favor of defendants Barrows and Stanek.

I. False and Defamatory Statements

Defendants first allege that plaintiff failed to sustain her burden of proving that false and defamatory statements had been published. Plaintiff contends that this issue is not preserved for appellate review because it was not raised in the original brief on appeal to this Court and is outside the scope of the Supreme Court remand. We conclude that the statement of this issue and its resolution are consistent with the Supreme Court directive that we address “whether the handwritten caption on the mailed report constitutes a non-defamatory statement of opinion when considered in its context within the report as a whole”

“The First and Fourteenth Amendments of the United States Constitution prohibit public figures from recovering damages caused by a defendant’s statement unless they prove that the statement was a defamatory falsehood and that it was made with actual malice” *Lakeshore Community Hosp, Inc v Perry*, 212 Mich App 396, 402; 538 NW2d 24 (1995). Libel is a “statement of and concerning the plaintiff which is false in some material respect and is communicated to a third person by written or printed words and has a tendency to harm the plaintiff’s reputation.” *Fisher v Detroit Free Press, Inc*, 158 Mich App 409, 413; 404 NW2d 765 (1987). “A libel may consist of a statement of fact or a statement in the form of an opinion,

but a statement of opinion is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion.” *Id.* Plaintiff has the burden of proving the elements of an alleged libel. *Id.* “The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.” *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005). However, when a defamation case involves a public figure, there is an additional requirement that there be clear and convincing evidence of actual malice. *Faxon v Michigan Republican State Central Comm*, 244 Mich App 468, 474; 624 NW2d 509 (2001). When addressing a defamation action, the appellate court must conduct an independent examination of the record to prevent forbidden intrusions into the field of free expression. *Id.* at 473. A libel case challenging the constitutionality of public discourse must be carefully examined with regard to falsity to ensure that precious liberties established and ordained by the Constitution are followed. *Rouch v Enquirer & News of Battle Creek (After Remand)*, 440 Mich 238, 253; 487 NW2d 205 (1992). Thus, an independent examination of the whole record is designed to ensure that the judgment does not constitute a forbidden intrusion into the field of free expression. *Id.* at 254 (further citation omitted). This independent review is premised on the fear that juries might give “short shrift to important First Amendment rights,” and reflects the inherent doubt that juries will recognize the line between unconditionally guaranteed speech and legitimately regulated speech. *Id.* at 253-254, 258.

In the present case, a review of the Stewart report as a whole with the handwritten caption reveals that it does not contain false and defamatory statements that are actionable. The report was a summary of events surrounding plaintiff’s employment that needed to be resolved. After the appointment of a new clerk, plaintiff was allowed to remain employed with the village, but her duties and salary were not definitively resolved. Stewart wrote a report to address the problems, but acknowledged that his report was based on his understanding, assumptions, and hearsay. Indeed, Stewart was not involved with plaintiff’s initial employment with the village. The report did contain information that was not correct when it improperly identified plaintiff as an independent contractor and reported that she did not receive a W-2. Statements concerning an individual’s employment status and entitlement to benefits are not defamatory. The report delineated Stewart’s opinion that plaintiff obtained a higher rate of pay for her bookkeeper position by waiting until he worked from home to take the issue up with the treasurer. This opinion was subjective and premised on the timing of the event. The report clearly reflects that it was Stewart’s subjective opinion. Moreover, the report acknowledged that plaintiff sought and received approval for the higher rate of pay. The handwritten caption reflects a question premised on the content of the report. Under the circumstances, the report and handwritten caption are not actionable, but rather constitute non-defamatory statements of opinion. *Mitan*, 474 Mich at 24; *Fisher*, 158 Mich App at 413.

II. Provable as False

Next, our Supreme Court has directed us to address whether the handwritten caption is provable as false. All statements are not actionable; rather, to be actionable, a statement must be provable as false. *Ireland v Edwards*, 230 Mich App 607, 616; 584 NW2d 632 (1998) (citing *Milkovich v Lorain Journal Co*, 497 US 1, 17-20; 110 S Ct 2695; 111 L Ed 2d 1 (1990)). A

statement is provable as false if it is an objectively verifiable event, but a statement is not actionable if it is a subjective assertion. *Ireland*, 230 Mich App at 616. The handwritten caption questions whether plaintiff misused taxpayer funds and is not provable as false. Again, it is premised on the report that addressed the subjective timing of plaintiff's questioning of her pay rate and to whom the question was directed. The caption reflects a commentary on the content of the Stewart report. We conclude that the caption on the Stewart report is not provable as false. Therefore, plaintiff cannot meet her burden of proving the elements of defamation. *Fisher*, 158 Mich App at 413.

III. MCL 600.2911(3) – The Fair Reporting Privilege

This issue is moot in light of our resolution of issues I and II. However, because of the Supreme Court's instruction that we address it, we conclude that the fair reporting privilege applies to the Stewart report.

Issues of statutory construction present questions of law subject to de novo review. *Hunter v Hunter*, 484 Mich 247, 257; 771 NW2d 694 (2009). The fundamental purpose of judicial construction of statutes is to ascertain and give effect to the intent of the Legislature. *In re Certified Question*, 433 Mich 710, 722; 449 NW2d 660 (1989); *Amburgey v Sauder*, 238 Mich App 228, 231-232; 605 NW2d 84 (1999). Once the intention of the Legislature is discovered, it must prevail regardless of any rule of statutory construction to the contrary. *Certified Question*, 433 Mich at 722. The language of the statute expresses the legislative intent. *Dep't of Transp v Tomkins*, 481 Mich 184, 191; 749 NW2d 716 (2008). The rules of statutory construction provide that a clear and unambiguous statute is not subject to judicial construction or interpretation. *Id.* Stated otherwise, when a statute plainly and unambiguously expresses the legislative intent, the role of the court is limited to applying the terms of the statute to the circumstances in a particular case. *Id.* Terms that are not defined must be given their plain and ordinary meanings, and it is appropriate to consult a dictionary for definitions. *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004). Application of the law to the facts is reviewed de novo. *Centennial Healthcare Mgt Corp v Dep't of Consumer & Industry Servs*, 254 Mich App 275, 284; 657 NW2d 746 (2002).

MCL 600.2911 states, in relevant part:

(3) If the defendant in any action for slander or libel gives notice in a justification that the words spoken or published were true, this notice shall not be of itself proof of the malice charged in the complaint though not sustained by the evidence. In an action for slander or for publishing or broadcasting a libel even though the defendant has pleaded or attempted to prove a justification he or she may prove mitigating circumstances including the sources of his or her information and the ground for his or her belief. *Damages shall not be awarded in a libel action for the publication or broadcast of a fair and true report of matters of public record, a public and official proceeding, or of a governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, or for a heading of the report which is a fair and true headnote of the report. This privilege shall not apply to a libel which is contained in a matter added by a person concerned in the publication or*

contained in the report of anything said or done at the time and place of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body, which was not a part of the public and official proceeding or governmental notice, announcement, written or recorded report or record generally available to the public, or act or action of a public body. [Emphasis added.]

Plaintiff contends that this provision is irrelevant because the privilege only applies to media defendants, not private individuals. Although prior versions of the fair reporting privilege limited its application to members of the media, subsequent revisions removed this language. The plain language of the statute in its current form contains no qualification regarding the type of defendant to which the privilege applies. *Tomkins*, 481 Mich at 191. Therefore, plaintiff's challenge is without merit.

The plain language of MCL 600.2911(3) states that damages shall not be awarded in a libel action for the publication "of a fair and true report of matters of public record ... or for a heading of the report which is a fair and true headnote of the report." Plaintiff contends that Stewart acknowledged at trial that information contained in the report was incorrect, and therefore, the document cannot constitute a fair and true report. We disagree. The terms "fair" and "true" are not defined in the statute. "Fair" is defined as "free from bias, dishonest, or injustice ... legitimate, sought, done, given ..." while "true" is defined as "being in accordance with the actual state or conditions; conforming to reality or fact ... real; genuine; authentic" Random House Webster's College Dictionary, pp 472, 1403 respectively. To qualify as "fair and true," the "gist" of the article must be substantially true. *Northland Wheels Roller Skating Ctr, Inc v Detroit Free Press, Inc*, 213 Mich App 317, 325; 539 NW2d 774 (1995) (quotation omitted). Minor differences or inaccuracies are deemed immaterial if they do not alter the "complexion" of the publication. *Id.*

At trial, Stewart acknowledged that statements contained in his written report were not correct. However, if one reviews the memorandum as a whole, the document was prepared to resolve the issues surrounding the clerk and bookkeeper position. Stewart acknowledged that some events occurred before he was hired. At times, he stated in the report that it was prepared based on his understanding, his assumptions, and his information from third parties. In light of these qualifications contained throughout the document, the Stewart document was a fair and true report of the information that Stewart had at that time. That is, the "gist" of the report was substantially true. *Northland Skating*, 213 Mich App at 325. With regard to the publication with the added caption as a headnote, we note that it addresses the same questions contained in the Stewart document. Specifically, whether plaintiff deliberately raised the issue of her salary when Stewart was out of the office and whether she raised the inquiry to the appropriate person. We conclude that the fair reporting privilege applies in light of the preface in the report regarding the basis of the information and the qualifications. The inaccuracies contained in the report did not alter the complexion of the publication. *Id.*

Plaintiff also contends that MCL 600.2911(3) does not apply because the report is not a public record subject to the Freedom of Information Act (FOIA), MCL 15.231 *et seq.* At trial, Stewart asserted that his report was placed in plaintiff's personnel file, was a public record, and

was subject to FOIA. In the trial court, plaintiff did not present a witness from the village to contradict this testimony. In the supplemental brief filed on remand, plaintiff asserts that the Stewart report was not subject to FOIA because it was a preliminary report exempt from disclosure. MCL 15.243(m). However, MCL 15.243(m) provides that the exemption does not apply unless the public body shows that the interest in ensuring frank communication between officials and employees of public bodies clearly outweighs the public interest in disclosure. In the present case, plaintiff presented no testimony from any village employee that if a FOIA request had been made, an exemption from disclosure for frank communication would have been requested. More importantly, the plain language of MCL 600.2911(3) does not provide that the term “public record” is limited to the definition found in FOIA and is exclusively governed by FOIA and its exemptions.² *Tomkins*, 481 Mich at 191. Therefore, plaintiff’s challenge is without merit.

IV. The Public Apology

In light of our other rulings this issue is moot. However, to comply with the Supreme Court order, we also vacate the inclusion of a public apology in the judgment pursuant to the jury’s verdict. The propriety of the jury’s sua sponte inclusion of an apology on the verdict form was raised, addressed, and decided in the trial court, and therefore, it is preserved for appellate review. *Michigan’s Adventure, Inc v Dalton Twp*, ___ Mich App ___; ___ NW2d ___ (2010), (Docket No. 292148 issued October 21, 2010); *Polkton Twp v Pellegrom*, 265 Mich App 88, 95; 693 NW2d 170 (2005). “An inquiry into the nature, scope, and elements of a remedy is a question of law that is reviewed de novo.” *Auto-Owners Ins Co v Amoco Prod Co*, 468 Mich 53, 57; 658 NW2d 460 (2003). Jurisdiction over equitable questions belongs to the judiciary, and juries are not permitted to devise specific remedies. *Brown v Kalamazoo Circuit Judge*, 75 Mich 274, 285; 42 NW 827 (1889). When a jury renders a verdict that includes equitable remedies, that portion of the verdict is surplusage and does not affect the validity of the remainder of the verdict. *Robertson & Wilson Scale & Supply Co v Richman*, 212 Mich 334, 339-340; 180 NW 470 (1920). Accordingly, the inclusion of a public apology on the jury verdict form was erroneous.

Reversed and remanded for entry of judgment of no cause of action.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello

² MCL 600.2911(3) does not define “public record” and does not refer to FOIA for the definition of public record.